

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Electricity Market Design and Structure)	Docket No. RM01-12-000
)	
Midwest Independent System Operator)	Docket No. RT01-87-000
)	
Alliance Companies)	Docket No. RT01-88-000
		(not consolidated)

**REQUEST FOR LEAVE TO FILE COMMENTS ONE DAY
OUT-OF-TIME AND COMMENTS OF THE NRG COMPANIES
AND THE CONSTELLATION COMPANIES
IN RESPONSE TO NOTICE INVITING COMMENTS
ON WHOLESALE MARKETING ACTIVITIES**

Pursuant to Rule 2008 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.2008, and the Commission's Notice Inviting Comments on Wholesale Market Activities ("Notice"), issued November 20, 2001, in the above-captioned proceedings, NRG Power Marketing, Inc., NRG Granite Acquisition, LLC, Morris Cogenerative, and NRG Audrain Generating LLC (collectively, the "NRG Companies"); and Constellation Power Source, Inc. ("CPS"), and its affiliates University Park, LLC ("University Park"), Wolf Hills Energy, LLC ("Wolf Hills"), and Holland Energy LLC ("Holland") (collectively, the "Constellation Companies") (all of the foregoing companies collectively called the "Joint Movants"), hereby respectfully request leave to file their comments herein one business day out of time, and submit their comments in the above-captioned proceeding.

The Commission's Notice requests interested parties to comment on how certain market activities should be apportioned between entities among separate entities within an RTO region, which presumably include transmission-owning "independent" transmission companies. As shown below, "independent" transmissions companies ("ITCs") and Transco's are not independent or perceived to be independent, but are in fact market participants. Moreover, the

ITC's and Transco's direct financial interests in owning, building and operating transmission assets are not aligned with the goals of operating a physical spot market, the sine quo non of competition, and must be separated from that function to insure the efficient operation of the electricity markets for the benefit of consumers. Because they are market participants, and their transmission asset functions are not aligned with the operation of physical spot markets, ITCs and Transcos should not be given control over the following market functions:

- (1) Developing and overseeing the implementation of a single congestion management system.
- (2) OASIS administration, and the establishment of a uniform method for determining ATC and TTC.
- (3) Security coordination.
- (4) Market Monitoring (which should have a separate Board).
- (5) Regional transmission facility planning.
- (6) Tariff administration, including the administration of generator interconnection procedures (except system impact studies) and agreements.
- (7) Ancillary services.
- (8) Administration of balancing markets.

To ensure that each regional RTO provides a framework for an efficient and vibrant competitive market within their region, the foregoing market activities should be allocated to non-transmission owning ISOs.

In support hereof, the Joint Movants state as follows:

I. COMMUNICATIONS

Communications in connection with this filing should be addressed to each of the following individuals

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II. BACKGROUND

The Commission's Notice invites all interested persons to file comments on: (a) whether responsibility for performing RTO functions should be apportioned between separate entities within an RTO region; and if so, (b) how the following market activities should be apportioned between such entities:

1. Congestion management.
2. Ancillary services.
3. Administration of a balancing market.

4. OASIS administration, including total transmission capacity ("TTC") and available transmission capacity ("ATC") calculations.
5. Security coordination.
6. Market monitoring.
7. Regional transmission facility planning.
8. Tariff administration and design.

The Joint Movants respectfully submit that most of the above market activities be allocated to non-transmission owning independent entities such as ISOs as discussed below.

III. MOTION TO FILE COMMENTS OUT OF TIME

The Joint Movants respectfully submit that good cause exists to grant its motion to file the comments below one business day out of time. The deadline for filing comments on the Notice was Friday, December 7, 2001. The Joint Movants attempted to e-file their comments at approximately 4:45 p.m. on Friday, December 7, but was unable to do so because the Commission's website for e-filing was apparently not working properly. By the time counsel for the Joint Movants became aware of the website's inability to accept e-filings, it was too late to attempt to file the comments by hand delivery. Because these comments are being filed on the first business day after the original deadline, and no proceedings have been held in these dockets since the deadline, granting this motion will not disrupt any proceedings, or result in any prejudice to, or additional burdens upon, existing parties.

IV. DISCUSSION

A. The Independence Requirement Mandates that Market-Related Functions be Under the Control of a Truly Independent Entity.

In Order 2000, the Commission declared that formation of regional transmission organizations (“RTOs”) was a critical step in the further development of a competitive energy market by creating regional energy markets operated by independent entities. The Commission identified the principle of independence as the “bedrock upon which an RTO must be built.”¹ Specifically, the Commission stated that the RTO decision-making process must be independent of any market participant or class of participants.² Moreover, this principle must be applied to an RTO and each segment of the RTO and that an RTO must be “independent in both reality and perception.”³ While the Commission avoided a “one size fits all” approach to governance, recognizing that RTOs could differ significantly in structure and patterns of ownership, the Commission required that the independence characteristic of Order No. 2000 would only be satisfied if the proposed governance structure results in a “independent decision-making by the RTO or the components of the RTO decision making process ... independent of individual market participants and classes of market participants.”⁴

Because Transcos and ITCs, as transmission-owning entities, have an economic incentive to maximize their investments in, and return on, transmission facilities, those entities are not “independent”, but fall squarely within the definition of “market participants”. As defined by Section 35.34(b)(2)(ii) of the Commission's regulations, 18 C.F.R. §35.34(b)(2)(ii), “market

¹ Order No. 2000 at 31,060.

² Id.

³ Id. at 31,066.

⁴ Id. at 31,074.

participants" include "Any . . . entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions." A Transco or ITCs would make most of its money from its ownership of grid assets, and would thus have strong economic incentives to use any functional responsibilities given to it to maximize the value of its transmission assets. A Transco would have many ways to do this, such as creating apparent congestion that justifies grid expansions, or performing planning studies that emphasize grid solutions over generation solutions. The term "independent" Transmission Company is an oxymoron, and obscures the fact that ITCs are "market participants" that, if given the opportunity, will compete with other market participants.

In determining how the enumerated list of responsibilities should be apportioned between a Transco or ITCs and an independent system operator in an RTO, the analysis must include whether the entity satisfies the independence requirement, both in fact and in perception. The reason for this requirement is that market participants must have confidence that the market administrator will be truly independent from all market participants or class of market participants. Market administrators that are either beholden to a particular group of market participants or are perceived to be, will retard the development of an independent and vibrant energy market. Placing the market administrative function within a Transco or ITC will hinder the development of a region-wide energy market because these transmission companies at a minimum will be perceived to favor their shareholders, the transmission utilities, which may also be market participants. For example, most utility members of a Transco or ITC will have market interests that are no different from other market participants.

In determining how the above market activities should be allocated, the preeminent role of the efficient operation of the physical spot market in achieving the Commission's goals in establishing RTO's should be preserved. To ensure the efficient operation of the physical spot market, ITS and Transcos should not have any responsibility for functions that could effect the

physical spot market. The physical spot market includes, at a minimum, congestion management, a balancing market and ancillary services. In addition, a physical spot market should include the following functions:

- A day ahead and real time energy market based upon the physical scheduling and dispatch of the system.
- Use of locational based marginal pricing to calculate congestion costs which should include a system of financial transmission rights (FTRs) and a trading hub that is composed of a combination of busses.
- Performance of the clearing house activities, such as settlement, billing and credit functions.
- Publication of spot energy and ancillary service prices to insure transparency in the market.
- Administration of an appropriate reliability assurance mechanism such as a capacity or forward reserve market.

Moreover, If one were to create an incentive mechanism for the operation of physical spot market, it would need to be separate and distinct from any incentive transmission rate mechanism provided to the ITC for transmission asset investment. This is because the functions are different. The market function is similar to a classic commodity market including clearinghouse functions. However, in the electricity industry that market is inextricably tied to the physical operation of the system. As a result they must be operated together and the incentives for such an operation are different and as pointed out above sometimes at odds with those for a transmission asset owner.

Even if ITCs or Transcos are limited to performing the few activities discussed below, the Commission should nonetheless continue to require that ITCs and Transcos satisfy the independence requirement to the maximum extent possible to ensure that even those limited

activities are performed in a non-discriminatory manner. Specifically, the ITCs and Transcos' governance structure should be reviewed in detail. For example, ITC or Transco boards that are subject to election or termination by the transmission owning companies will be beholden to such companies, and will not even be arguably independent. Also, stakeholder processes that give transmission owning companies more say than other market participants, or that give market participants only an advisory role while transmission owners enjoy a decision making role, will clearly slant the board to favor transmission owner interests over other market participant interests.

While Transcos or ITCs do not satisfy the independence requirement, and thus are not be appropriate agents to administer market functions, ISOs do satisfy independence requirements because ISOs do not have any market interest or shareholders who are market participants. As such, an ISO is ideally suited to administer and develop energy markets because it is independent and perceived to be independent of all market participants. Thus, one of the core purposes of Order 2000, namely to develop regional competitive energy markets mandates that market activities that are related to the operation or development of an energy market, as opposed to activities that are associated with transmission should be the province of an ISO.

B. Congestion Management, Ancillary Services, Administration of a Balancing Market, Security Coordination, Market Monitoring, Tariff Administration and Design (Except Rates and Rate Design) Are Core Market Functions that Should be Under the Control of an ISO.

1. Congestion Management.

Congestion management is one of the major determinants of how an energy market will develop and operate. Specifically, how congestion is priced and who pays the congestion costs affects not only bilateral transactions but also how a centralized energy market operates. Congestion Management is a critical component for market participants to hedge against their

“transportation” risk for contracts they may wish to enter into. Also, a properly developed congestion management program is key to the efficient use of the regional transmission system because use of congested interfaces are given a market value, namely the price of obtaining congestion rights. Thus, while congestion management affects usage of the transmission system, its primary effect is on the efficiency of the energy markets. Moreover, the development of a regional energy market is predicated on a single integrated energy market and congestion management system. Having separate and distinct congestion management proposals within one area will result in the creation of seams between these areas and the markets within these areas will become separate markets. This will occur regardless of whether these areas are located within one RTO. For example, if the various ITCs within a regional RTO have separate congestion management systems, the goal of having a single energy market within each RTO region will be frustrated. Given that congestion management is primarily a market mechanism it is essential that an ISO, and not a Transco, be given the responsibility over the development and implementation of congestion management for the reasons noted above.

2. Ancillary Services.

Ancillary services such as ten minute spinning reserve, ten-minute non-spinning reserves and thirty minute operating reserves (collectively, the “Reserve Products”) should also be under the control of an ISO because they are similar in nature to the energy market. Specifically, the Reserve Products are used in the event of a contingency such as a generating facility tripping off line or the outage of a transmission line that requires the immediate replace of the energy source. For example, the security constrained dispatch in the New York region co-optimizes the Energy and Reserve markets and considers the selection of Reserve Products in determining the energy dispatch. The interrelationship between energy and the Reserve Products means that an ISO should have authority over both energy and the Reserve Products in order to develop a vibrant energy market. If an organization such as a Transco has control over the Reserve Products, and

an ISO has control over the energy market, the goal of a seamless regional energy market beyond bilateral transactions will be frustrated because of inconsistent rules between these interrelated products. Separating out ancillary services would create an impediment to the development of an ancillary services market, and thus make the co-optimization of the markets virtually impossible.

Thus, the fact that Reserve Products have traditionally been obtained as a transmission service through the applicable transmission tariff is not sufficient reason to have such services under the control of a Transco or an ITC. Again, market-related functions must be controlled by an independent market administrator and that administrator must not be perceived as being beholden to one set of market participants. Therefore, an ISO should be responsible for ancillary services such as the Reserve Products.

3. Administration of a Balancing Market.

The administration of a balancing market should clearly be under the control of an ISO and not a Transco. Energy transactions must not be limited to balanced schedules and energy imbalance services because this would fly in the face of the proper development of a physical spot energy market.⁵if a vibrant spot market similar to PJM were established for each regional RTO market. Such a spot market would obviate the need for the traditional transmission tariff based imbalance services. However, if a well-functioning physical spot market is not available immediately, energy imbalance services can be viewed as the first step in developing this centralized energy market. We expect that a Commission directive concerning the standardization of this type of market will provide the impetus for the development of physical spot markets outside of the Northeast. The development of centralized energy markets requires that the administration of the balancing market and its companion, energy imbalance service, be under the control of an ISO. Leaving these services to a Transco or an ITC will frustrate the

development of a robust energy market and insure that the market does not develop beyond simple bilateral transactions.

4. Security Coordination

Security coordination involves two major functions: (i) insuring that energy dispatch will maintain reliability; and (ii) making determinations of when to permit a transmission line or generation to go off line. Both of these functions are market functions and should therefore should be within the province of the ISO. The first function, insuring reliability is maintained, is also known as security constrained dispatch. This function is key to having both a centralized market and insuring that reliability is maintained. For example, the three Northeastern markets all have their energy market activity and their security constrained dispatch function interwoven so that the market dispatch of energy is also consistent with reliability concerns. Separating this part of the security coordination function from market dispatch will eventually be harmful to the development of an energy market, and raise reliability concerns. Market dispatch must be consistent with reliability in order for the energy markets to survive in the long run. Thus, this aspect of security coordination must lie with the ISO as an indispensable part of market activities.

The second function within security coordination - determining when it is appropriate to take either a transmission line or generating facility of service - should also be within the control of the ISO because of activities potentially significant market impact. As noted above, a Transco and its utility-owning shareholders have an interest in whether a line is taken out of service because such a determination will impact the revenue it receives from the operation of the transmission system. The utilities have an economic interest because they are market participants and therefore have an interest in anything that impacts market prices. It would be inappropriate for such entities to have control over this aspect of security coordination because of

⁵ For a more detailed discussion, see the comments of CPS in Docket No. RM01-12-000.

the market impact. Therefore, both parts of security coordination must be within the control of the ISO.

5. Market Monitoring

As discussed in the Joint Movant's Motion to Intervene and Protest ("Motion") filed on November 19, 2001, in Docket No. RT01-88-010, the Independent Market Monitor should be overseen by a Market Monitoring Committee ("Committee"). The Committee itself should be governed by an independent Board of Directors whose primary function would be to direct or over see the activities of the Committee. Thus, the Committee and the Market Monitor would be independent of both the RTO and any ITC or Transco. The Joint Movants would refer the Commission to their Motion for a more complete discussion of how the Market Monitoring function should be structured.

6. Tariff Administration and Design

The ISO should have sole authority over its tariff and design, including the right to make Section 205 filings to modify or change any provision of the tariff, with the exception of rate and rate design for transmission services (but not ancillary services). The Joint Movants would not object to the ITCs and TOs having the right to make FPA Section 205 filings to adjust the rates charged for transmission services (but not ancillary services) to loads within its service area, and its revenue requirements.

C. Transcos that Exist in Combination with an ISO can have the Authority over OASIS Administration, Regional Transmission Planning, and Rates and Rate Design.

1. OASIS Administration.

The ISO should be solely responsible for OASIS administration, except for the calculation of total transmission capacity ("TTC") and available transmission capacity ("ATC"). TTC and ATC calculations should be performed by the Transcos, ITCs and the individual TOs,

but in accordance with methodologies approved by the ISO, and subject to the oversight of the ISO and the Market Monitor. This approach will ensure that TTC and ATC will be calculated in a consistent and non-discriminatory fashion. A Transco or ITC subject to the oversight of an ISO has sufficient expertise to perform the TTC and ATC calculations. While TTC and ATC calculations are more closely related to transmission, these calculations can have substantial impact on the markets. Clearly, these calculations and the must be closely overseen by an entity that has no financial interest in energy markets to prevent transmission owning market participants favoring their affiliates. In addition, the calculations of TTC and ATC must be consistent on a regional basis. Specifically, assumptions and other inputs into the calculations must be consistent within the same region or RTO, as must the underlying methodology for determining transmission capacity and its availability. Consistency in this area will insure comparability for all market participants in assessing and reserving transmission capacity, and will also enhance the accuracy and usefulness of TTC, ATC and related measures.

2. Regional Transmission Planning.

Regional transmission planning can be coordinated by a Transco if the Market Monitoring function has the ability to review and approve the plan, and the plan is consistent with the efficient operation of the electricity markets. The Plan should be regional in scope, and should be focused on identifying least cost alternatives to resolving constraints. All market participants, including transmission utilities, should have the same right to participate in the planning process because transmission planning will have a dramatic effect on the market in the long-term. Giving the Transco the authority to coordinate the transmission planning process subject to final approval by the ISO will insure that Transcos have authority over related transmission functions but the potential impact on the markets is protected by the agency responsible for the market related issues, namely the ISO.

3. Rates and Rate Design.

As previously mentioned, the Joint Movants would not object to the ITCs and TOs having the right to make FPA Section 205 filings to adjust the rates charged for transmission services (but not ancillary services) to loads within its service area, and its revenue requirements.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Joint Movants respectfully request that the Commission grant their request to file these comments one business day out-of-time, determine that ITCs and Transcos are not independent, or perceived to be independent, but are in fact market participants, and thus should not be allocated the following market activities:

- (1) Developing and overseeing the implementation of a single congestion management system.
- (2) OASIS administration, and the establishment of a uniform method for determining ATC and TTC, and oversight of the ITCs and the TOs implementation of those methods.
- (3) Security coordination;
- (4) Market Monitoring (which should have a separate Board).
- (5) Regional transmission facility planning.
- (6) Tariff administration, including the administration of generator interconnection procedures (except system impact studies) and agreements.
- (7) Ancillary services.
- (8) Administration of balancing markets.

The reasons discussed above, the foregoing activities should instead be allocated

solely to non-transmission owning ISOs.

Dated: December 10, 2001

Respectfully Submitted,

THE NRG COMPANIES

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 10th day of December, 2001.

_____/s/_____
Robert Y. Hirasuna